



Shoreland Management Advisory Committee Meeting Notes March 24, 2003 Madison

I. Welcome – Next meeting will be on Tuesday, May 6, 2003

New permanent members of the committee:

Jim Liebert - riparian representative

Marc Schultz – riparian representative

Robert Kendall – riparian representing Taxpayers for Fair Zoning - (Jay Verholst as designated stand in for this meeting)

NR 116 discussion members (specific to this meeting only):

Claire Silverman (Daniel Wilson representing her) – League of Wisconsin Municipalities

Larry Larson - Association of State Floodplain Managers (will attend tomorrow)

Tamara Dudiak – UW Extension Lakes Program

Mark Cupp – Wisconsin Riverway Board

II. Early History of Zoning Nationally and in Wisconsin --- JoAnne Kloppenburg –

NOTE: Joanne's presentation and her requested addendum

(a copy of a March 26, 2003 published Court of Appeals Decision related to a nonconforming structure vertical addition in Washington county) **can be found on our webpage at www.dnr.state.wi.us – go to choose some topics and select “shoreland Management, once on the homepage, look under the March 24-25 Advisory Committee meeting.**

Wisconsin was the first state in the nation to authorize counties to adopt comprehensive county zoning ordinances. In 1966, the Legislature charged counties to zone shorelands. When zoning was first enacted, nonconforming uses and structures were created.

A three-way balance is required by the Wisconsin Courts:

- (1) allowing reasonable continued use of NC uses
- (2) level playing field for all structures and property owners
- (3) public interest in speedy elimination of nonconformities.

Many early zoning ordinances, to be fair, established restrictions on nonconforming uses of structures.

The Wisconsin Legislature has only partially resolved the nonconforming use and structure problem:

- cities are required to use the 50% rule
- towns, villages, and counties have more leeway.

The Legislature has left it to the counties and WDNR (through its rule making) to decide how to regulate NC uses and structures in floodplain and shoreland areas. Nonconforming uses and structures must be regulated so that they are eventually relocated to a compliant location.

Public nuisances lose their nonconforming status. Nonconforming uses cannot be extended or changed – invalidating old nonconforming use if changed.

Wisconsin court cases cited that have held that nonconforming uses can not be legally expanded or extended or changed. It was noted that these cases do not distinguish between structures with nonconforming uses and nonconforming structures with conforming uses.

The Marris case was cited in dealing with interpreting the 50% rule, which also recognized that the spirit of zoning is to restrict and eliminate nonconforming uses and structures as soon as possible.

Wisconsin law only protects the continuation of uses and structures that existed at the time that the zoning restrictions took effect.

Not regulating nonconforming uses and structures would violate equal protection principles – it would violate the federal Constitution and Wisconsin Constitution to allow nonconforming uses and structures to continue unrestricted or to continue forever. A zoning provision that only

applies to new construction would be unconstitutional. In the long run, all property owners must be treated equally.

Early case law on nonconformities involved noxious uses (such as salvage yards).

Structures in the shoreland setback area are legally considered “noxious” as well. The public harm that NC’s cause is “less visible, less immediate and more diffuse” than the harm caused by other types of “noxious” uses, however.

She asked: What would you let the owner of a salvage yard too close to a residential area do? She suggested that a similar standard should be applied to owners of nonconforming structures in the shoreland setback area.

Some counties prohibit additions to NC structures – she believes that prohibition serves the purposes required by Wisconsin law. Other options may not.

QUESTIONS:

Chip Nielsen: He is concerned with JoAnne’s failure to draw distinction between nonconforming uses and nonconforming structures.

She responded that the distinction that he is trying to make is without a legal significance; the case law on variances recognizes this fact.

Chip Nielsen: The Kenosha County case has taken away the counties’ ability to use variances.

Tom Larson: asked if the statutes distinguish between nonconforming uses and nonconforming structures.

JoAnne: Counties have general police powers to regulate nonconforming structures as well as uses.

Pam LaBine: How are we going to manage variances that all ready exist, and still grant equal protection?

JoAnne: The public expects the counties and the State to apply the correct laws to all property owners equally.

Pam: Regulation of NC's in the statutes is a "may" issue (not required).

JoAnne: Counties may choose how to regulate NC uses and structures; but common law requires some form of regulation of NC uses and structures. She also pointed to the City of Madison's initiative to create special exception permits for substandard lots in the city as a mechanism to minimize the need for variances.

Q: What is the controlling case law or statute that applies to the 50% rule?

JoAnne: General authorization statutes and provisions on NC uses and structures in s.59.69 and s.62.23, Stats.

Comment: On structure vs. use issue; isn't it true that a structure in a setback area is a nonconforming use?

JoAnne: The jargon isn't very helpful; it is sometimes not easy to decide if a regulation restricts use or only location.

Tom Larson: Is there case law that clearly establishes that the public trust doctrine requires regulation of NC uses and structures?

JoAnne: cited Kenosha County decision also the Just vs. Marinette County decision.

Michael Dresen: How do we reconcile the policy to eliminate NC's with statute that allows reconstruction of damaged or destroyed NC's?

JoAnne: That statute creates a reasonable classification that would withstand constitutional challenge.

Michael Dresen: It seems inconsistent to allow reconstruction of damaged or destroyed structures while telling owners of substandard lots that they may not be able to rebuild in the future.

Jay Verholst: It is important to distinguish between NC uses and NC structures because of the nonconforming lots that are being created, with increasing lot sizes.

Elmer Goetsch: We should not e that a nonconforming lot can be built upon – the law doesn't prevent a county from allowing a structure on a NC lot, right?

JoAnne: That is true.

Tom Larson: Would the county be able to allow all landward additions if the county adopts a purpose statement that recognizes policy to allow such additions?

JoAnne: You are mixing apples and oranges; regulation of NC's must be consistent with purposes of shoreland ordinance in the statutes (s. 281.31, Stats.)

Chip Nielsen: cited restoration and preservation of historic homes in New England; we need that flexibility.

JoAnne: The cabins that have been built too close to our lakeshores should not be allowed to be continued or enlarged just because they are old.

Comment: One alternative is to move homes; another alternative; requiring the property to be brought into compliance when the current owner dies.

JoAnne: Your second alternative has been used in some of our settlements of litigated zoning cases.

III. The 50% Rule --- Paul Kent

This issue is a “full-employment for lawyers” issue. The 50% rule is a means to an end. He wants to discuss this issue as a means to try to solve some of the NC regulation issues that have been raised.

First important area to think about:

- (1) Overall purpose of the NC use and NC structure provision – ultimate goal is eventual compliance of NC uses and structures (cited Justice Abrahamson’s statements in Marris decision). It is an Amortization theory: however, most of us don’t have the same sense of using up the useful life of an asset when they think of our house.
 - Statute that allows rebuilding damaged or destroyed NC buildings reflects the public expectations that are out there that we need to keep in mind.
 - We ought not to be too afraid of equal protection issues as we debate various alternatives, unless we are proposing that NC uses and structures will not be subject to any regulation.
- (2) We need to be cognizant of the difference between nonconforming uses and nonconforming structures with conforming uses as we discuss nonconforming regulatory alternatives.
- (3) Alternatives must be evaluated in terms of how they will impact the shoreland buffer.
 - Clearly, the public trust doctrine would authorize county regulation of the shoreland area. Does the public trust doctrine prohibit certain approaches? Presumably so.
 - (statute authorizing rebuilding could be held to be unconstitutional if it exceeds what is allowed under the public trust doctrine)

Implementation Issues (50% Rule):

First Issue – What is subject to the 50% rule? (different ordinances regulate differently)

- Usually, the ordinances distinguish between “routine maintenance and repair” and structural alterations. He quoted Justice Abrahamson’s discussion on structural repairs and alterations in the Marris decision.
- A general rule can not be stated. Case-by-case decisions must be made.

Second Issue – Definition - What is a structure?

Using a balcony replacement case as an example, he asked if a balcony bolted to the house is a separate structure. The county BOA said that it was.

Third Issue – Calculating 50% limit.

- a. Value of the improvement
 - How do you come up with an accurate estimate of the value of the improvement? What if a contractor gives the homeowner an estimate that doesn't breakdown structural versus nonstructural repairs? There is also a record keeping issue for past repairs.
- b. Value of the structure
 - Example:

1980	\$50,000 value	20% used
1980-improvement	\$10,000 cost	
2000	\$200,000 value	???
2000-improvement	\$20,000 cost	

Would improvements totaling \$30,000 over time exceed 50% of the value of the structure? Some counties use the value of the home at the time that the ordinance that made the structure nonconforming was adopted.

Example: 1980

\$15,000 out-of-date assessment

\$10,000 improvement – not allowed

Comment: What about using equalized assessed value?

Answer: That is an option.

Fourth Issue – “Real World” Complications

Example: while replacing the siding, you discover that major structural repairs will be required that will put you over the 50% limit. What is the property owner to do?

System Issues (Placing 50% Issue in the Context of Shoreland Zoning)

- A. Variances: Lawyers can differ on status of Wisconsin law on variances. His advice for shoreland zoning purposes, applying for a variance is now a waste of time. When you had variances, you had a safety valve. Now that safety valve is gone in most cases.
- B. Variability within Counties and Towns: He doesn't advocate eliminating county and town flexibility, but giving counties and towns additional options, and allow them to use the 50% rule if they'd like to, many not solve the problem.

Paul Kent: There is clearly a need to regulate NC uses and NC structures. We need to do so in a simpler way than the currently implemented 50% rule.

Michael Dresen: What are counties required to do?

Paul Kent: NR 115 requires regulation of NC uses; 50% rule is an option, though.

Michael Dresen: What exactly is the purpose of NC use regulation?

Jay Verholst: Doesn't find a requirement to regulate nonconforming uses and structures in the statutes or rules.

Paul Kent: There is a requirement to regulate NC structures once created, however. Anything that previously existed that doesn't comply with new standards is by definition a nonconformity.

Paul Kent: Only way to avoid the problem, would be to change NR 115; For example, no structure may be closer than 75 feet from the OHWM without a special exception use permit. However, in his opinion, this would be the "long way around the block." There are more efficient ways to accomplish reasonable regulation of NC uses and structures than using the special exception process.

Q: What about donated labor?

Paul Kent: The value of the labor should be added to the cost of an improvement, although it is addressed differently in different counties.

Q: Does the law really require that NC structures be eliminated?

Paul Kent: You are really asking: is there a statutory problem or a constitutional problem? A real Public trust/constitutional problem exists if there is no limitation on NC structures reconstruction or expansion.

Paul Kent: We need to acknowledge that people don't view their lakeshore homes as, in effect, a life estate that will end at some point. Shoreland zoning purposes are to protect water quality, habitat and aesthetics.

Q: Shouldn't we be focused on these goals when we debate alternatives for the regulation of NC structures?

Paul Kent: Yes.

Q: Are more restrictive town shoreland zoning ordinances a potential problem? (Can towns adopt more restrictive shoreland zoning ordinances?)

Paul Kent: He is more concerned about more restrictive county ordinances (that exceed minimum standards) than more restrictive town ordinances. However, yes, a town can have a more restrictive shoreland-zoning ordinance.

Nancy Russell: There is an alternative, that Walworth County has had since 1974; rebuilding within existing envelope allowed; 50% rule only applies to structures with NC uses.

IV. Real World Applications

1. Bayfield County: Karl Kastrosky

Their ordinance is on their web site. The zoning staff spends about 80% of their time on NC uses and structures. They will now allow unlimited repairs and maintenance; 25% of structural members' alteration is the cut-off. They made this change to enhance the county tax base as well as keep the property owners happy. However, mitigation is required (and not everyone is happy with that). Mitigation requirements allow the zoning department to only issue permits for quality development.

Expansion and change to roofline require a permit. There are some enforcement problems with mitigation. They don't require mitigation to be implemented prior to construction.

Continuing problem: no provision to allow owner to move the NC structure back from OHWM if he or she wants to. Also, homes on island: where is the landward side?

Q: What level of effort/expense is involved with mitigation?

A: We give credit for existing good practices, and allow a variety of options.

Q: 25% limit on structural improvements?

A: 25% structural member cap can't be exceeded – haven't had such a case yet. It is hard to draw the line between repair and rebuilding otherwise.

Q: How are mitigation requirements enforced:

A: We can impose fines and sue for injunctions to correct violations.

Q: Do you treat structures the same regardless of degree of nonconformity?

A: No.

0-20 ft. – no expansion allowed

20-40 ft. – 175 sq. ft. addition on landward side allowed

40-75 ft. – expansion up to 50% of existing sq. footage, plus sq. footage caps

Q: How do you regulate sand beaches?

A: Our sand beaches are man-made and are generally above the OHWM and are easily fixed.

Q: Do you inspect for replacement of structural members?

A: Yes.

Q: Do you keep a record of structural repairs?

A: Yes, we try. We also keep a record of one-time expansions.

Q: What about expansions outside of restricted area?

A: Same limitations. (Better than what we had before.)

2. Washington County (Phil Gaudet)

- rapidly growing county; late 1998, decided to revise their shoreland and floodplain code
- we “drew a line in the sand” at 50 ft. You can’t improve or expand a NC structure lakeward or upward or replace structural components within 50 ft. of the OHWM. You can do whatever you want outside of 50 ft. in terms of improving NC structures. You have the option to apply for a variance if you want to replace structural components within 50 ft.

Q: How would you deal with structures on the Historic Registry?

A: We haven’t had that situation.

They have 3 water body classifications; no mitigation requirements for class 3; mitigation only required for class 1 and 2 waterbodies if averaging can’t be used.

June 2001: new ordinance was adopted. 10-15 variances per year since then.

Q: Does Washington County have a minimum building square footage?

A: No; just maximum square footage for additions.

Q: In your averaging, do you allow a structure to average with itself (on a point, for example)?

A: No; averaging of structures within 200 feet only. Only applies to principal structures – not accessory structures.

3. Forest County (Pam LaBine)

80% of the property is in public ownership in Forest County. The county Board of Forest County has passed a resolution saying that they want no change to NR 115. The ordinances adopted in Bayfield County and Washington County wouldn’t work in Forest County.

In 1999, the county adopted a new shoreland ordinance borrowed from elsewhere. When Pam started working for the County, variances could no longer be granted.

They amended their ordinance to make nonconforming regulations only apply to NC uses; they changed the terminology to call NC structures “legal pre-existing structures.”

There was support for “no mow” mitigation requirements, especially since the Gard legislation already requires mitigation if a gazebo is built. For septic systems, they haven’t imposed any requirements above requirements of Comm 83. They are much happier now than they were before their ordinance was changed. You could wreck our tax base if you change the definition of NC structures.

She read from the resolution adopted by the Forest County Board.

Q: How many of your waterfront properties would be considered non-conforming?

A: Over 50%.

Q: Why would that have an impact on your tax base if no action is taken to remove NC structures?

A: People won’t buy property that is nonconforming.

Comment: If that were true, real estate sales would be decreasing, not increasing. The price of land is increasing, not decreasing, even though there are many NC structures.

Pam Labine: I wouldn’t buy a nonconforming property myself, even if others would.

Earl Cook: There was no effect on land value when Washburn County adopted a waterway classification system with increased setbacks for some waterways, creating new NC structures.

Pam: Mitigation requirements are very loosely written.

Q: How can Forest County ignore state law requirements?

A: We believe that we can define the term “nonconforming.”

Carmen Wagner (DNR): Forest County still has limitations on expansions and reconstruction of “legal pre-existing structures” even though they aren’t called “nonconforming structures.”

Q (Glenn to Phil Gaudet): Has Washington County's ordinance change affected land values?

A (Phil): He can't answer that question; doesn't know the answer.

V. Modifications to Nonconforming Structures Located in the Primary Buffer --- Al Shea

The options package is a "clay pigeon" being thrown out to the committee. Is there a different way to accomplish shoreland protection objectives other than the zoning approach adopted by the State Legislature in 1966?

Q: Has DNR run these alternatives passed the Dept. of Justice?

A (Gary Heinrichs - DNR): No, not specifically.

Michael Dresen: JoAnne said earlier today that allowing unlimited maintenance and repair would not comply with Wisconsin law.

Gary Heinrichs: "unlimited" option has some limits. We won't be as concerned about the distinction between structural repairs and non-structural repairs, but replacement structures must be brought into compliance.

Q (Tom Larson): What would trigger the need for mitigation?

A (Gary Heinrichs): Something other than ordinary maintenance. There may be an equity issue if \$10,000 worth of mitigation is required for \$1,000 worth of improvements. There will need to be some balance.

Q: Would credit be given for work already done?

A (Gary Heinrichs): I think we can work that into the mitigation system.

Karl Kastrosky: We need to consider the approach that would require shoreland protection mitigation in exchange for being allowed to make improvements to NC structures.

Paul Kent:

- (1) How often is mitigation required? What if several structural repairs are made over time? There may not be anything else you can do, in the future, for mitigation.
- (2) Removing artificial beaches is one thing. We need to be very careful about requiring the removal of shoreland protection structures (there may

be areas where shoreland vegetation may not be sufficient to prevent shoreline erosion).

Al Shea: Are you saying that there should be an end-point where further mitigation would not be required

Paul Kent: Yes.

Al Shea: I think we can work that into the mitigation system and come back to the committee at the next meeting with a recommendation.

Phil Gaudet: This committee should be deciding what the purpose of NC structure regulation should be first.

Al Shea: read purpose statement from s. 281.31, Stats. – state legislated shoreland zoning statute.

Tom Larson: the statute talks about maintaining the status quo, not about improving the situation.

(Note, however: Sec. 990.001(3), Stats. Provides that, in interpreting the statutes, the “present tense of a verb includes the future when applicable.”)

Chip Nielsen: Every house will eventually become nonconforming if you take the long view. He argued that there is no reason why different standards can’t be applied to new construction than are applied to existing structures.

Pam LaBine: Canada uses a “shoreland zoning seal of approval.” At some point, it has to be done with.

Chip Nielsen: Market forces will achieve the replacement of nonconforming structures with conforming structures.

Michael Dresen: Perhaps we should recognize a right to make “ordinary maintenance and repair” without mitigation. There should be proportionality of cost of mitigation.

Jay Verholst: Most zoning case law involves development in cities and villages; it will be very difficult to try to come up with standards that make

sense in all areas of Wisconsin. Is there science that shows that the run-off from a roof located 40 ft. from the OHWM will cause water pollution? When the original rules were adopted, the drafters had the wisdom to allow counties the flexibility to develop the details of shoreland regulation themselves.

Nancy Russell: If we don't require mitigation for improvements in the primary buffer, we won't have any mitigation for structures in primary buffer at all! She agrees with idea that issuance of a building or zoning permit should trigger mitigation requirements.

Al Shea: NR 115 currently requires a 35-foot vegetative buffer; but there is rampant non-conformity; how will we get people to come into compliance with this buffer standard?

Tom Larson: Building permit triggering mitigation requirements is o.k. in concept. The rule needs to allow counties the option of developing mitigation options of their own that meet performance standards instead of trying to generate an all-inclusive list.

Paul Kent: Does prohibiting mowing around homes create a fire hazard?

Glenn Schiffmann: 50-foot clear-cut area is recommended for high-fuel pine tree areas by DNR and federal government.

Miles Benson: Incentives will accomplish more than a prohibition as far as achieving compliance is concerned.

Paul Kent: People who are already good stewards of the land should be given credit, and not required to do more mitigation.

Paul Mongin: We need to keep protection of our natural resources in mind; we shouldn't be making NR 115 less protective.

Jay Verholst: We need to educate the public. That will do more good more quickly.

Phil Gaudet: Do you want conceptual comments or detailed comments now?

Al Shea: We will ask for the sense of the committee on specified general concepts tomorrow, after DNR staff have a chance to regroup.

Phil Gaudet: He assumes that it is the consensus of the committee that NC structures will be allowed for a longer time-frame before they are required to reach overall compliance.

Paul Kent: We should keep in mind that we are starting with the most difficult situations: structures in the primary buffer.

Nancy Russell: In order to achieve statutory purposes, we need to have mitigation as part of the package, so that we don't give up something without getting something in return.

Meeting adjourned until Tuesday, March 25th, at 8:30 a.m.